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Nos. 07-1428, 08-328

In The
Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such tests because of the race of the successful candidates?

PARTIES TO THE PROCEEDING

The additional petitioners are Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan DiVito, Steven Durand, William Gambardella, Brian Jooss, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Edward Riordan, Timothy Scanlon, Benjamin Vargas, John Vendetto, and Mark Vendetto.

James Kottage and Kevin Roxbee were plaintiff-appellants below with respect to claims not relevant to this case. They have an interest in this proceeding only to the extent of their interest in those claims.

All respondents are listed in the caption. At all times relevant to this action, John DeStefano was Mayor of the City of New Haven, Karen Dubois-Walton was Chief Administrative Officer, Thomas Ude, Jr. was Corporation Counsel, Tina Burgett was Director of Personnel, and Boise Kimber was a member of the Board of Fire Commissioners. Respondents Malcolm Weber and Zelma Tirado were members of the city's Civil Service Board.

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OPINIONS BELOW

The district court's opinion, now reported at 554 F.Supp.2d 142, is reprinted at Pet.App. 5a-51a. The court of appeals's unpublished order is unofficially reported at 2008 WL 410436 and reprinted at Pet.App. 1a-4a. The *per curiam* opinion withdrawing the earlier order is reported at 530 F.3d 87 and reprinted at Supp.Pet.App. 1a-3a. The order denying rehearing en banc is reported at 530 F.3d 88 and reprinted at Supp.Pet.App. 4a-36a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331, 1343(a)(4). The court of appeals issued a judgment on February 15, 2008, subsequently withdrew the summary order on which that judgment was based, and entered a new judgment on June 9, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 *et seq.*, as amended, are lengthy and reprinted at Pet.App. 54a-58a.

INTRODUCTION

Our Constitution envisions a society in which race does not matter and individuals are judged on the strength of their character and the value of their achievements. Equal treatment and race neutrality are overarching principles deeply imbedded in the Equal Protection Clause. The Court has made clear that meaningful equality under the Equal Protection Clause and equal opportunity under Title VII are not achieved by discriminating against one group of individuals to benefit another group on account of race. Discrimination only begets more discrimination, and it deepens racial divides that are only bridged by implementing the equal treatment the Constitution and Title VII require. Thus, the Court strictly scrutinizes the use of racial considerations in public employment and contracting and has permitted it only as a rare remedy narrowly focused to correct actual intentional governmental discrimination.

Connecticut law and New Haven's charter implement a civil service system that promises fair and merits-based treatment for all. Petitioners sought to deepen their commitment to public service and to better their circumstances for themselves and their

families through extraordinary efforts to prepare for and succeed in that process. Their disappointment in being denied the promotions they earned because of the city's overtly race-based determinations is no different than that of other Americans who have been discriminated against on account of their race and found the courthouse doors open to them. Petitioners ask nothing more than the basic American right to be judged by who they are and what they have accomplished, not by the color of their skin.

STATEMENT OF THE CASE

In 2003, New Haven sought to fill command vacancies in its fire department. Petitioners qualified for promotion under a race-blind, merit-selection process mandated by local law but were denied the positions by the city because of their race and racial disparities in the examinations' outcome.[1] City officials refused to promote the successful candidates and left the vacancies unfilled, intending to repeat the competition with the aim of awarding a higher proportion of the promotions to minority candidates.

[1] Petitioner Benjamin Vargas is Hispanic; the other qualifying petitioners are non-Hispanic whites. Although "Hispanic" denotes ethnicity and not race, petitioners use the term "race" generally to refer to both.

I. NEW HAVEN'S CIVIL SERVICE LAWS AND REGULATIONS REQUIRE MERIT SELECTION.

The city's charter establishes a competitive merit system requiring all entry-level and promotional vacancies in the classified civil service to be filled with the most knowledgeable and ablest individuals as determined by job-related examinations scored on a one-hundred-point scale. No examination question may relate to race nor may any candidate be denied promotion because of race. Pet.App. 74a-77a, 80a-82a, 85a-86a, 89a-113a. After each examination, the Civil Service Board must promulgate (or "certify")[2] a ranked eligibility list of applicants who score at least seventy percent. The "rule-of-three" requires the Board of Fire Commissioners to fill each vacancy from among the top three scorers on the list to curtail political patronage, prevent improper favoritism, and ensure selection of the most qualified candidates. The list is active for a maximum of two years from the date of its promulgation. Pet.App. 88a-90a, 104a-106a, 109a.

[2] Corresponding civil service rules and regulations define "certify" to mean "[t]he process of supplying an appointing authority with the names of eligibles for appointment." Pet.App. 89a.

II. RESPONDENTS HAVE REPEATEDLY VIOLATED THE LAW TO AVOID MERIT SELECTION.

The Connecticut Supreme Court has consistently mandated strict compliance with civil service laws, citing the public need for the most able workforce free of favoritism, corruption, and the spoils system that these laws were designed to eradicate. See, *e.g.*, *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000-1004 (Conn. 2005) (finding that New Haven's *post hoc* manipulation of promotion test scores to evade the rule-of-three violated the law and undermined the purpose of ensuring selection of the most qualified by limiting discretion and hence patronage, race discrimination, and corruption). The administration of New Haven's Mayor DeStefano has drawn multiple, stern rebukes from state judges for "blatant lawlessness," *Henry* v. *Civil Serv. Comm'n*, 2001 WL 862658, *1 (Conn. Super. July 3, 2001), in employing "charade[s]," *id.*, at *2, and "subterfuge[s]," *Kelly*, 881 A.2d, at 1003, to subvert the law and stood accused in multiple suits of repeatedly and intentionally discriminating against whites and manipulating exam results for political gain. See *Henry*, 2001 WL 862658, *1-*3; *Bombalicki* v. *Pastore*, 2001 WL 267617, *2-*3 (Conn. Super. Feb. 28, 2001), aff'd, 804 A.2d 856 (Conn. App. 2002); *Hurley* v. *City of New Haven*, 2006 WL 1609974, *1 (Conn. Super. May 23, 2006); see also Pet.App. 756a-761a, 935a-937a. In reaction, respondents unsuccessfully sought voter approval to eliminate the rule-of-three by charter amendment. *Kelly*, 881 A.2d, at 1001, n.41; see also CA2 J.A. 1683-1684; Pet.App. 756a-761a. Only after

suffering serial setbacks in the state courts and at the ballot box did respondents for the first time adopt the justification of "voluntary compliance" with federal law when they refused to grant the promotions earned through the 2003 examinations.

III. Respondents Strove to Ensure the 2003 Exams Were Job-Related and the Promotion Process Was Race-Neutral.

Respondents engaged Industrial/Organizational Solutions, Inc. (IOS), a professional testing firm with experience in public safety, to develop promotional examinations that would identify those with the knowledge, skills, and abilities (KSAs) needed to perform the command responsibilities of captains and lieutenants. Pet.App. 308a-328a. The NHFD is a multi-disciplined emergency-service agency in a port city with major transportation networks. Lieutenants and captains must have a sophisticated level of KSAs and must possess considerable scientific and tactical knowledge, leadership skills, and good judgment. Pet.App. 348a-352a, 361a-366a. Apart from fire science, they must be well versed in building and high-rise construction, structural collapse, tactical response protocols for fire and non-fire-related catastrophes, confined-space and high-angle rescue, use of sophisticated equipment, and other subjects. They report directly to a battalion chief and indirectly to the chief. They must be able to train, discipline, and lead first responders. At the direction of the state, the NHFD also responds to medical emergencies and

must provide pre-hospital medical care. *Ibid.*; see also Pltffs.' Exhs. 46, 47, R. Doc. #120.

The qualifying process included a written job-knowledge examination followed by a comprehensive structured oral assessment of applicants' skills and abilities to command others in emergencies. Pet.App. 1077a-1164a (containing the exams). The job-knowledge exam accounted for 60% and the oral assessment for 40% of the total score. Pet.App. 312a, 483a. The cutoff composite score was calibrated to equate with minimal competence. Pet.App. 330a-331a.

IOS composed and validated the exams based on EEOC-recommended practices. Pet.App. 316a-317a, 329a-335a.[3] Aware that New Haven, like other cities, routinely experiences racial disparities in outcomes of qualifying exams, IOS went to great lengths in collaboration with city officials to mitigate that impact to the greatest extent possible without compromising the integrity of the exams. It engaged in a painstaking process of job analyses, employing questionnaires, interviews, and ride-along exercises with incumbents to identify the importance and frequency of essential job tasks. There was a deliberate overrepresentation of minority incumbents in this process. Pet.App. 150a-154a, 262a-264a, 337a-343a, 597a-650a.

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[3] See 29 C.F.R. §§1607.5, 1607.14, 1607.16 (providing that content-validity is established by thorough job analyses and identification of essential KSAs).

IOS identified professional texts and other source material in collaboration with NHFD Chief Grant and Assistant Chief Dumas, who is black. Pet.App. 625a-627a, 817a-818a, 847a-848a. The written tests went through several drafts and were pared down to 100 questions after painstaking analysis and cross-checking of each item against source material. Pet.App. 309a-310a, 623a. The city went beyond the norm by allowing a three-month study period and providing highly particularized syllabi that allowed candidates to focus on specific chapters of each text from which test questions were drawn. Pet.App. 346a-374a, 799a-800a. Promotional examinations are infrequent opportunities for career advancement, and petitioners bore significant expense and personal sacrifice during the three-month study period.[4]

To mitigate any potential adverse impact, exams were written below a tenth-grade reading level. Further aiming to stem adverse impact, all candidates could proceed to the oral assessment phase irrespective of their performance in the job-knowledge examination. Pet.App. 160a-161a, 267a-268a, 338a, 666a.

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[4] For example, Frank Ricci, to overcome dyslexia, paid to convert study texts to audio recordings; Gregory Boivin resigned from part-time jobs; Benjamin Vargas and his wife both took leave from their second and primary jobs; and Christopher Parker studied in his wife's hospital room as they awaited the delivery of their son. Pet.App. 375a-378a, 392a-398a, 402a-409a, 413a-419a.

Unlike the written exam, which measures job knowledge, the oral phase is designed to test skills and abilities (though some measure of parity is expected). Pet.App. 667a, 708a-709a. City officials and IOS went to similar extraordinary lengths to devise a content-valid, comprehensive, structured oral assessment process for candidates to be rated by panels of fire-service professionals. Seeking the most knowledgeable assessors, IOS searched nationwide and consulted minority organizations for officers in the rank of captain or above. It assembled a pool of thirty assessors that included battalion chiefs, assistant chiefs, and chiefs, in which minorities were overrepresented—all nine active three-member panels included only one nonminority member (even though most candidates were white). Pet.App. 162a-165a, 268a-270a, 344a-345a, 654a-661a.

Panelists reviewed keyed responses and performed mock rehearsals and exercises designed to calibrate ratings. They were trained to engage in consensus rating, a measure designed to ensure consistency and prevent one assessor from skewing results by atypical scoring. Candidates were allowed to organize their thoughts on paper before articulating responses to various incident scenarios and were measured for their tactical knowledge and skills, leadership ability, and sound judgment in life-and-death situations. The process was monitored by IOS experts, and post-assessment review showed the panel ratings were sound, consistent, and indicative of a high level of reliability. Pet.App. 164a-168a,

269a-271a, 656a-657a, 661a-663a. Ninety applicants took the lieutenant's written exam, of whom seventy-seven chose to proceed to the oral assessment. Pet.App. 168a, 271a, 428a-432a. Forty-one applicants took the captain's exam. Pet.App. 433a-436a. Review of candidate feedback questionnaires showed that, overall, candidates believed the examinations were fair and job-related. Pet.App. 338a, 651a-652a. The exams fairly and validly tested candidates' relative levels of KSAs. Pet.App. 179a, 197a-199a, 277a, 289a, 329a-339a, 603a-606a, 633a-634a, 1023a-1025a.

IV. After Learning the Race of Candidates Who Would Have Been Immediately Promoted, Respondents Scuttled the Promotions.

Candidates were race-coded. The scoring results revealed racial disparities in pass rates and levels of KSAs for those who did pass that were similar to adverse impact ratios seen in previous exams. Pet.App. 423a-427a, 950a-957a. Candidates of all races passed both exams and were eligible for promotion. Pet.App. 428a-436a. Most of the petitioners were among the top scorers and eligible for immediate promotion. Pet.App. 24a-25a, 390a, 437a-438a. Because of the small number of immediate vacancies, however, applying the rule-of-three meant, according to respondents, that no African-Americans could be immediately promoted and the new lieutenants "w[ould] all be white," though two Hispanics would be among the eight new Captains. Pet.App. 439a-445a, 475a-476a.

Respondents conceded that additional lieutenant vacancies arose that would have allowed three African-Americans to be promoted. Pet.App. 235a-236a, 305a-306a.

Respondent Kimber, a local political activist and valuable vote-getter for Mayor DeStefano who was a member and former chairman of the Board of Fire Commissioners, contacted the mayor's office to try to prevent petitioners' promotions. Pet.App. 812a-816a, 882a-883a. From early on, respondents agreed to adopt an air of neutrality while privately collaborating to push the board to scuttle the promotions. *E.g.*, Pet.App. 446a-459a, 832a.

Respondents' initial effort to impugn the validity of the examinations failed when IOS refused to concede nonexistent flaws in the tests. According to IOS representative Chad Legel, in a meeting to discuss the test results, respondents ignored his assurances of validity and focused instead on the "racial" and "political" overtones of the situation. Pet.App. 333a-334a. Industry-standard protocol and IOS's contract called for a technical report that would elaborate on the exams' content-validity and scoring methodology and establish the city's lawful use of test results for selection notwithstanding any adverse impact. Pet.App. 330a-331a. Respondents had previously accepted such reports and proceeded with selections. See Pet.App. 958a-1011a (sample of previously accepted technical report). IOS stood ready to issue the report, but respondents did not wish to receive it. Pet.App. 331a-334a.

The ministerial promulgation of the eligibility lists by the board was interrupted by a letter from city counsel Ude raising the specter of a Title VII violation and respondents' unprecedentedly providing to the board race-coded, but name-redacted, eligibility lists. Pet.App. 428a-436a, 439a-445a. Petitioners introduced evidence showing that the name-redacted lists were designed to thwart any judicial challenge to the city's intended action. Pet.App. 232a-235a, 305a, 783a-784a. Despite IOS's explicit request, respondent Burgett, the city's personnel director, declined to share with the board either IOS's letter noting its confidence in the exams' validity or respondents' decision to abort delivery of the technical report. Pet.App. 190a-191a, 287a, 329a-339a.

The board met four times. Attempting to establish the availability of equally valid alternative tests with less adverse impact, respondents solicited three professionals to offer opinions, among them Christopher Hornick, an IOS competitor, who spoke briefly to the board by telephone. Hornick commented that there was "significant adverse impact" from the written exams, but that it was "fairly typical" and "generally in the range of what we've seen professionally." Pet.App. 548a-549a. He asserted generally, without having even studied the exams, that he had developed tests with less disparate impact,[5] but he

[5] Hornick did not specify whether he was referring to promotional exams or entry-level aptitude tests. Pet.App. 548a.

emphasized that he was "not suggesting that I/O Solutions somehow created a test that had adverse impacts that it should not have had." Pet.App. 549a, 553a, 556a. He referred to an "assessment center" testing method but offered no details or disparate-impact analysis of the method. Pet.App. 557a. Hornick concluded by noting that, although the exam results showed adverse impact, the city should proceed with the promotions, Pet.App. 558a, and offered his services for future tests, Pet.App. 562a-563a.

Janet Helms, a professor of race and culture with no expertise in public safety, neither examined the tests or their development and validation; nor did she consult with IOS, relying instead solely on demographic statistics and newspaper articles. Pet.App. 571a, 573a. Helms characterized the tests' disparate impact as "not that inconsistent with what predictions would say" and added that she could predict disparate impact on any written test before it was given. Pet.App. 570a, 573a.

The third consultant, and the only one to actually study the exams, was Vincent Lewis, a highly credentialed expert in fire and homeland security services. Lewis, who is African-American, thought well of the exams and believed they measured the KSAs that commanders must possess. Pet.App. 461a-464a, 563a-569a, 828a.

At the board's final meeting, respondents Ude, Dubois-Walton (speaking for the mayor), and Burgett urged abandoning the lists in favor of unspecified

potential alternatives, citing Hornick's remarks and dismissing Lewis's. Leaders of the city board of aldermen's black caucus urged the board to reject the lists for the sake of diversity and civil-rights requirements. Pet.App. 458a-459a, 575a-582a. Not allowed to speak were Chief Grant and Assistant Chief Dumas, although they were involved in the exam development process. Both believed the exams were fair and valid and the results should have been respected. Pet.App. 228a-229a, 817a-818a, 845a-852a. Although respondents denied any improper motive in excluding the views of the NHFD's top two officials, Kimber was allowed to disrupt the board's proceedings, object to the promotions, and threaten board members with political reprisals. Pet.App. 490a-498a, 780a-781a, 857a-858a. The board deadlocked and the promotions were scuttled.[6] Pet.App. 586a-589a. Just in case, the mayor, on Ude's advice, was prepared to override a board vote to certify with an executive order prohibiting the Board of Fire Commissioners from awarding promotions.[7] Pet.App. 590a-591a, 819a-820a.

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[6] Only four members voted; respondents Weber and Tirado voted against certification. Pet.App. 586a-588a. The nonvoting fifth member was the sister of one of the unsuccessful minority candidates. Pet.App. 829a-831a.

[7] Under the city charter, New Haven's mayor has no vote on the civil service board. Pet.App. 72a.

V. PROCEEDINGS BELOW

Petitioners sued under 42 U.S.C. §1983 alleging respondents' actions violated the Equal Protection Clause and filed timely charges of discrimination with the EEOC. Upon the EEOC's issuance of right-to-sue letters, petitioners amended their complaint to assert violations of 42 U.S.C. §2000e-2 *et seq*. After discovery closed, the parties cross-moved for summary judgment on the equal protection and Title VII claims.

Respondents conceded that they were not relying on an affirmative action plan, were not acting to remedy prior discrimination, and were not attempting to achieve racial diversity in the command ranks. Pet.App. 938a-945a, 1013a-1037a. Their rejection of petitioners, they insisted, stemmed solely from their "good faith" belief that promoting them would violate Title VII's disparate-impact provision. *Ibid*. The city's chief civil service examiner conceded she could discern no flaws in the written examinations or any basis to question the fairness of the oral assessors' ratings. CA2 J.A. 1243-1244, 1259-1260, 1268.

Dubois-Walton confirmed that respondents were not asserting that the exams were invalid. All she understood from Hornick was that a possible exam alternative, the so-called "assessment center" approach, might exist that "may have" less adverse impact. Pet.App. 827a, 848a, 853a-856a. Respondents cited Hornick's out-of-court statements to the board

as evidence of their "good faith" belief that alternatives might be available.[8] Petitioners countered with evidence of Hornick's own publications which directly contradict his hearsay comments regarding the assessment center approach.[9] Pet.App. 390a, 592a.

The district court granted summary judgment for respondents on petitioners' Title VII and equal protection claims. Despite the absence of any equally valid alternatives with demonstrably less racially adverse impact, the district court dismissed petitioners' Title VII claim by stating that "it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method."[10]

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[8] Respondents also proffered other out-of-court statements, including unsubstantiated assertions about civil service practices in Bridgeport, Connecticut, from the leaders of an outside minority firefighter group. CA2 J.A. 827-844. When challenged, respondents conceded that all of the out-of-court statements to the Board were inadmissible to establish the availability of alternatives and proffered them instead for the limited purpose of establishing a purported state-of-mind defense. Pet.App. 1024a-1025a.

[9] Legel explained that, unlike a written examination, an assessment center is not "geared toward measuring job knowledge" and generally cannot assess a candidate's command of technical information. Pet.App. 707a-713a. He emphasized that "the assessment center is not a substitute for a written exam." Pet.App. 718a.

[10] EEOC guidelines advise that a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the

(Continued on following page)

Pet.App. 34a. The court resolved the contested issue of respondents' motivation as a matter of law, Pet.App. 47a, and elsewhere observed the tests' "undesirable outcome" could "subject the City to Title VII litigation by minorit[ies] and the city's leadership to political consequences." Pet.App. 24a. Addressing petitioners' assertion that respondents' professed fidelity to Title VII was a pretext for intentional race discrimination against them to provide political patronage benefits for minority allies of respondent Kimber, the court concluded that even if "political favoritism or motivations" were "intertwined with [respondents'] race concern," that would "not suffice" even to get petitioners past summary judgment. Pet.App. 43a. In dismissing petitioners' equal protection claims, the court reasoned that since no one was promoted, and all candidates were "treated the same," respondents' action was race-neutral and strict scrutiny did not apply. Pet.App. 45a-46a.

By a brief one-paragraph summary order, the court of appeals affirmed the judgment, concluding that "the [Board] found itself in the unfortunate position of having no good alternatives. . . . [B]ecause the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." Pet.App. 3a-4a.

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rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. §1607.4(D).

Subsequently, a judge of the court of appeals *sua sponte* requested a poll on rehearing en banc. On June 9, 2008, after the poll was concluded but before its result had been announced, the panel withdrew its summary order and simultaneously issued a *per curiam* opinion essentially duplicating the summary order. See Supp.Pet.App. 1a-5a. Three days later, the Second Circuit announced it had voted 7-6 to deny rehearing en banc, with Judges Parker and Calabresi concurring in the denial of rehearing. Supp.Pet.App. 4a-11a, 30a-33a. Judge Cabranes, for all six dissenting judges, questioned the panel's evident conclusion that "any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from scrutiny under Title VII" and its failure to address the constitutional issues at the core of the case. Supp.Pet.App. 11a-30a.

SUMMARY OF THE ARGUMENT

The City of New Haven's refusal to promote the plaintiff firefighters because of their race violated the Equal Protection Clause. The Equal Protection Clause is fundamentally skeptical of race-based government action; accordingly, the Court has consistently subjected such action to strict scrutiny, invalidating it in all but the rarest of circumstances. See, *e.g.*, *Adarand Constructors*, *Inc.* v. *Pena*, 515 U.S. 200, 224 (1995). The city's refusal to promote petitioners was a race-based government action grounded solely on the racial distribution of the test results. The

entire cluster of reasons respondents offered for scrapping the promotions are related to and depended on petitioners' race and therefore, should be strictly scrutinized.

Respondents' action fails strict scrutiny. The city did not offer a compelling interest to justify its race-based action. It did not claim it was attempting to remedy past official discrimination, and its stated fear of Title VII litigation or liability based merely on unintentional numerical disparity cannot supply the requisite compelling interest, particularly when respondents had no reason to think that the test inflicted any impermissible discrimination. The purported interest of seeking to provide role models for minorities, which the district court wrongly attributed to respondents, has already been rejected by this Court as uncompelling. *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Similarly, respondents disclaimed an interest in diversity and, in any event, diversity has never been (and should not now be) accepted by this Court as a compelling interest in the government-employment context. Respondents' putative interest in avoiding political criticism could never be a compelling reason to racially discriminate. Finally, the remedy selected by the city—cancelling the promotions across the board—was not narrowly tailored to achieve any compelling interest.

Allowing respondents to cancel these promotions after the administration of a fair and job-related test

designed to identify meritorious promotion candidates, simply because of the successful candidates' race and respondents' associated racial concerns, would allow overt racial balancing, de facto quotas, and blunt race politics in government hiring, all consequences the Court has sternly condemned in other contexts.

The city's refusal to promote petitioners also violated Title VII. Petitioners' claim of disparate treatment motivated by their race has gone essentially unrebutted, and Title VII cannot permit the city's intentionally discriminatory actions to be excused by unsupported claims about possible disparate-impact liability or nebulous claims of "voluntary compliance" that are effectively indistinguishable from the imposition of racial quotas. Mere numerical evidence of disparate impact cannot be enough, especially when respondents knew their tests were content-valid. And mere conjecture about the possible existence of alternative tests that might have less disparate impact is far too slender a reed to support government's resort to race-based deprivations. In addition, respondents' bold rejection of test results on the basis of race is independently prohibited by the 1991 amendment to Title VII forbidding race-based tampering with employment test results.

ARGUMENT

I. RESPONDENTS' REFUSAL TO PROMOTE PETITIONERS VIOLATED THE EQUAL PROTECTION CLAUSE.

A. The Equal Protection Clause Disfavors Race-Based Government Actions and Subjects Them to Strict Scrutiny.

The Equal Protection Clause disfavors race-based government action, requires that it be strictly scrutinized, and results in it being invalidated in all but the rarest of circumstances. See, *e.g.*, *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2751-2752 (2007). Because racial classifications are inherently pernicious, and because equal treatment irrespective of race is the absolute core of the guarantee of the Equal Protection Clause, the Court has consistently viewed race-based governmental action with skepticism and hostility. See *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.").

To implement the Constitution's deep aversion to racial distinctions, the Court has made clear that all race-based government actions are subject to strict

scrutiny, requiring the government to demonstrate that race-based action is narrowly tailored to achieve a compelling governmental interest. *Adarand*, 515 U.S., at 227. In practice, the Court has found few governmental interests compelling enough to justify disparate racial treatment and even fewer government actions to actually be narrowly tailored to achieve a compelling interest. Strict scrutiny applies fully to race-based actions taken out of a professed desire to advantage or remedy past harms to minorities; "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion); accord *Adarand*, 515 U.S., at 223-224. Merely expressing an intent to benefit minorities, as opposed to an animus towards whites, does not insulate such policies from scrutiny. *Adarand*, 515 U.S., at 226; see *Md. Troopers Assn., Inc.* v. *Evans*, 993 F.2d 1072, 1076 (CA4 1993) ("All too easily, invidious racial preferences can wear the mask of remedial measures . . . . Courts thus bear an especial obligation to scrutinize the asserted bases for race-conscious relief." (citations omitted)).

The Court has recognized that a government actor's desire to remedy its own past intentional discrimination can justify remedial resort to racial classifications in employment or contracting but has required that it first have "a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277). The Court has never in the context of

government employment or contracting extended the scope of interests that can justify race-based action beyond past intentional governmental discrimination.

B. Respondents' Refusal to Promote Petitioners Was a Race-Based Government Action Subject to Strict Scrutiny.

Respondents' refusal to promote petitioners was a race-based action subject to strict scrutiny. All of the reasons given by respondents in rejecting petitioners' promotions were fundamentally grounded on the race of the successful candidates—whether characterized as the racial balancing that it was, or euphemistically as concerns about Title VII compliance, fears of political reprisals from powerful minority interests, or interests in promoting diversity and role models. Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions. The cancellation of the promotions was specifically intended to—and did—prevent petitioners from being promoted because of their race.

"[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S., at 229-230. Petitioners were treated unequally because of their race: they were refused promotions only because they were white. The promotions were due under the city's charter and civil-service rules. Pet.App. 74a-86a, 99a-113a. Every reason advanced to justify abandoning

the promotions related to the fact that too many of the successful candidates were white. Because race-related reasons were the only reasons respondents offered, it is unquestionable race was the "predominant factor" in their refusal to promote petitioners. *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion). Respondents' decision, motivated by race, relying solely on racial-distribution information about the candidates, and with a starkly disparate racial harm, was not in any sense race-neutral.

Moreover, respondents' actions were consistent with a well-documented history of its repeated attempts to circumvent Connecticut civil-service protections. See *Kelly*, 881 A.2d, at 1000-1004; *Hurley*, 2006 WL 1609974, *1; *Henry*, 2001 WL 862658, *1-*3; *Bombalicki*, 2001 WL 267617, *2-*3 (detailing and criticizing the DeStefano administration's repeated attempts to circumvent Connecticut civil-service rules). This history is further evidence that the city's cancellation of the promotions was overtly a race-based action subject to strict scrutiny. See *Vill. of Arlington Heights* v. *Metro. Hous. Development Corp.*, 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

Moreover, even if the decision could be considered race-neutral in some nominal sense, that still would not insulate it from strict scrutiny. "A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was 'motivated by a racial purpose or

object.'" *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 913 (1995)). This rule applies fully in the employment context. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979) (stating that the rule that racial classifications are presumptively invalid also applies "to a classification that is ostensibly neutral but is a . . . pretext for racial discrimination"). Respondents' decision to cancel the promotions across the board was, at the very least, a pretext for their desire, clearly expressed in their deliberations, not to promote white firefighters precisely because they were white (or because they were not black, which is for constitutional purposes the same thing). That is a racial classification subject to strict scrutiny. See *Majeske* v. *City of Chicago*, 218 F.3d 816, 818-819 (CA7 2000) (government action taken out of fear of potential disparate-impact liability was influenced by race and thus subject to strict scrutiny).

Nor do the district court's reasons for refusing to apply strict scrutiny bear inspection. It makes no sense to conclude that petitioners were not disadvantaged on account of their race because promotions were denied to everyone who took the test. That contradicts a number of this Court's cases, including *Croson*, in which the racial classification the Court strictly scrutinized was implemented through an across-the-board cancellation of bids that was motivated by a city minority-subcontracting set-aside. *Croson*, 488 U.S., at 483. Petitioners were denied merit-earned promotion, and thus were treated differently than unsuccessful candidates who had not earned

promotion, solely because of their race. Respondents' race-coded lists revealed that those immediately impacted would all be white, with the exception of two Hispanics.[11] Pet.App. 428a-436a, 475a-476a. Denying promotion across the board because the city wanted to promote more minorities is the functional equivalent of a race-balancing quota subject to strict scrutiny. City officials acted specifically because of petitioners' race, not in spite of it. See, *e.g.*, *Williams* v. *Consol. City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003).[12]

The district court was also wrong in concluding that respondents' actions were not subject to strict scrutiny without evidence "that defendants acted 'because of' animus against non-minority firefighters." Pet.App. 47a. Animus is not necessary to show intentional discrimination, as is evident from the Court's many precedents overturning governmental racial discrimination that was based, not on animus towards whites, but on a stated benign intent to aid minorities. *E.g.*, *Adarand*, 515 U.S., at 226 ("More than good motives should be required when government

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[11] When the decision was made, respondents said no African-Americans would be eligible for promotion. The fortuity that slots later opened that would allow three African-Americans to be promoted, see Pet.App. 235a-236a, 305a-306a, does not change respondents' motivation at the time they made their decision.

[12] The district court's conclusion on this point is also fundamentally contradicted by its acceptance that petitioners had established a *prima facie* case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). See Pet.App. 25a.

seeks to allocate its resources by way of an explicit racial classification system." (quotation, alteration omitted)).[13]

C. Respondents' Race-Based Refusal to Promote Petitioners Fails Strict Scrutiny.

Respondents offered no compelling interest that could justify their race-based cancellation of petitioners' promotions. Respondents expressly disclaimed remedying past discrimination or achieving diversity, and, in any event, none of the potential interests confected by the district court is a compelling interest:

> "[T]hat the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." Pet.App. 47a.

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[13] If evidence of animus were required, petitioners presented it, including evidence of Kimber's racially charged appeals to the board and previous denigration of Italian-American firefighters in the NHFD. Pet.App. 490a-498a; CA2 J.A. 556-559.

1. Unsubstantiated Fear of Title VII Disparate-Impact Suits Cannot Be a Compelling State Interest.

Avoiding disparate-impact claims under Title VII cannot be a compelling interest justifying racial discrimination because the Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to avoid potential claims of unintentional racial discrimination. Even if there ever could be such a compelling interest, it could exist only if the government had strong evidence that unintentional discrimination had in fact occurred and not when, as in this case, there was little more than numerical disparity and indeed strong indications that the tests and their results would have survived any Title VII challenge.

The Court has never recognized a compelling governmental interest in avoiding unintentional racial disparities. Instead, the Court has only recognized a compelling state interest in remedying past intentional discrimination by the state. See, *e.g.*, *Croson*, 488 U.S., at 507. This limitation makes simple sense—given the deep perniciousness of intentional governmental racial classifications, they should not be allowed to redress unintentional governmental discrimination or ambient societal discrimination. *Wygant*, 476 U.S., at 276 (plurality opinion).

Respondents admitted they did not act to remedy past intentional discrimination against minorities. Pet.App. 938a-945a, 1013a-1037a. Indeed, New Haven and its officials have a documented history of violating Connecticut law to give minorities advantageous treatment in public employment. See *supra* at 5-6. The recognized compelling remedial interest is not at stake in this case. See *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992); *Croson*, 488 U.S., at 492-493 (plurality opinion).

Instead, respondents asserted that their interest was in complying with Title VII by avoiding the prospect of lawsuits claiming disparate-impact discrimination. But avoiding Title VII disparate-impact claims cannot justify intentional race-based disparate treatment. See *People Who Care* v. *Rockford Board of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 535 (CA7 1997). The Court has already made clear that the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts. *Davis*, 426 U.S., at 242. If avoiding mere numerical disparity becomes a compelling governmental interest to justify racial discrimination, then racial balancing will practically be compelled for any rational government employer. Governments, faced with potential (even if speculative) Title VII liability on the one hand, and complete immunity on the other—so long as they baldly assert a "good faith" belief they fear such liability, will have every incentive to take race-based action to avoid any racially disparate effects in public employment. In

short, "as a practical matter, *Washington* v. *Davis* would be undone," *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004), opening the door to the racial balancing that the Court has consistently condemned. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2758 (plurality opinion) ("racial balancing is not permitted"); *Grutter* v. *Bollinger*, 539 U.S. 306, 330 (2003) (attempt to achieve racial balancing would be "patently unconstitutional"); *Freeman*, 503 U.S., at 494 ("Racial balance is not to be achieved for its own sake."); *Croson*, 488 U.S., at 507.

The Constitution especially cannot permit governments to use claimed fears of disparate-impact liability as cover for what may actually be crude racial politics in action—a noxious and divisive practice this Court has roundly condemned in other circumstances. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2767 (plurality opinion) ("Government action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility." (quotation omitted)). If employers can reject the results of merit-promotion processes based on nothing more than a stated, unfounded, "good faith" fear of Title VII suits, or indeed a mere political indisposition to defend against them, the temptation to surrender to organized racial lobbies will be irresistible.

This case provides a striking illustration. In the thick of the city's decisionmaking when it cancelled the promotions was a well-connected local African-American politician. From the start, Kimber and his

friends in city government set out to thwart the promotions for reasons relating to racial politics. Pet.App. 812a-816a, 882a-883a. The mayor's inner circle even expressly discussed among themselves the need to make the process *appear* neutral and deliberative to cover their racial motivations. Pet.App. 449a, 459a. Kimber threatened board members with political reprisals if they allowed the promotions to go forward. Pet.App. 490a-498a. Intimidated, they voted the promotions down.

This Court has said strict scrutiny is designed to smoke out racial politics masquerading as remedial action. *Croson*, 488 U.S., at 493 (plurality opinion). So, too, must it smoke out racial politics masquerading as voluntary compliance with Title VII. The alternative would be the infiltration of public-employment decisionmaking by organized racial factions, and the accompanying emboldenment and strengthening of such factions resulting in their assumption of an increasingly larger and more divisive role in politics, especially at the local level. *Id.*, at 523 (Scalia, J., concurring in the judgment) ("[R]acial discrimination against any group finds a more ready expression at the state and local than at the federal level.").

A mere-good-faith rule would also contravene the Court's condemnation of the use of quotas or set-asides without a showing of past intentional racial discrimination by the government. See, *e.g.*, *id.*, at 499, 507. Government employers will be allowed (indeed, nearly compelled) to impose de facto quotas by simply rolling the dice over and over again until

the desired racial distribution turns up, cancelling promotions for whites whenever the racial distribution is unbalanced and permitting them whenever there are enough minorities to meet the racial goal. See *Lutheran Church-Mo. Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998); see also *Wygant*, 476 U.S., at 295 (White, J., concurring in the judgment) ("I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force."). Public employers will be freed and practically forced to use the EEOC's four-fifths guideline as a soft quota in hiring and promotion. *Biondo*, 382 F.3d, at 684 ("If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm . . . . ").

It would also contradict the clearly expressed intent of Congress:

> "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII. . . . Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . ." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, at 993 (1988) (plurality opinion) (quotations, citations omitted).

Thus, avoiding disparate-impact liability can never be a compelling state interest that could justify intentional racial discrimination.

If it ever could, however, it could only be allowed on evidence of a statutory violation far more robust than respondents amassed here. To guard against fear of disparate-impact liability becoming a backdoor to public employers' imposition of unconstitutional quotas, the Court has emphasized that "the evidentiary standards that apply in these [disparate-impact] cases should serve as adequate safeguards against the danger that Congress recognized." *Ibid.* These applicable "evidentiary standards" do not stop at mere evidence of numerical disparity. They require a private plaintiff to prove either: (1) that an employer's selection criteria has a racially disparate impact and is not job-related (*i.e.*, not consistent with business necessity); or (2) the availability of an equally valid alternative with less disparate impact that the employer refused to adopt. See *infra* Part II. Surely a governmental employer bears at least the same burden as a putative disparate-impact plaintiff, in whose shoes the employer seeks to stand. Indeed because the governmental employer both controls the development of the selection device and the evaluation of any alternatives in the first place, courts should be especially vigilant in scrutinizing governmental actions that conveniently relinquish the government's own available defenses in a quest to achieve a different racial balance. See *Ho ex rel. Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865

(CA9 1998) (whether remaining vestiges of segregation justified district's race-conscious policies, as district asserted, was peculiarly within district's knowledge and control, thus requiring evidence more concrete than mere conclusory statements).

This requirement is confirmed by the Court's cases finding a compelling government interest in remedying past intentional governmental racial discrimination. Because the Equal Protection Clause is based on a fundamental suspicion of race-based government actions, even government actors wishing to take race-based action to remedy past *intentional* governmental discrimination must provide "a strong basis in evidence" to prove that the claimed interest actually is present. *Croson*, 488 U.S., at 500. *A fortiori*, if avoiding potential disparate-impact liability could ever be a compelling governmental interest, there absolutely must be a strong evidentiary foundation to show that the asserted compelling interest is present.

Thus, at a minimum, a government actor must have a strong evidentiary basis to conclude that an examination disproportionately excludes minorities and that it was either not job-related or that there were equally valid alternatives with demonstrably less adverse impact available. The Court should emphatically reject a rule that would allow government actors like respondents to justify race-based decisionmaking with the mere articulation of an interest in voluntary compliance with Title VII, without strong evidence of actual liability. Cf. *Shaw* v.

Hunt, 517 U.S. 899, 908, n.4 (1996) (requiring a strong basis in evidence of an actual violation of the Voting Rights Act to justify race-conscious remedial action, and denying any compelling interest "in avoiding meritless lawsuits"). The district court's standard essentially authorizes outright race balancing, which the Court rightly has never been willing to allow.

The city had almost no reason beyond mere numerical disparity to believe its tests were discriminatory. At considerable public expense, the city employed tests that were professionally developed to minimize adverse impact as much as possible through a painstaking process involving the city's personnel director, chief civil service examiner, and top NHFD officials. There can be no dispute that these exams actually served their purpose of screening out the unqualified and identifying the most qualified. Pet.App. 340a-343a, 597a-650a. City officials not only reacted to IOS's oral assurance of validity with disappointment but avoided receiving a written validity report. They ignored not only the views of IOS, but also those of the NHFD's Chief and Assistant Chief (who is black), both of whom thought the exams were fair and valid. Pet.App. 331a-334a, 845a-852a. But attempts to remain willfully ignorant of a test's validity do not establish a compelling interest in avoiding discrimination that violates Title VII.

Similarly, respondents also failed in their attempt to suggest the presence of alternatives that could justify their actions. Respondents had no solid

evidence that there were equally valid alternatives to the tests they had given that would have had less adverse impact. Pet.App. 545a-574a, 1030a-1031a. Even the district court recognized the "shortcomings" in the evidence of alternatives. Pet.App. 37a.

In short, respondents had no reason to believe that the test actually had violated Title VII.[14] See also *infra* Part II. That cannot constitute a compelling interest justifying the race-based refusal to promote petitioners.

2. Attempting to Develop Role Models Is Not a Compelling Interest.

This Court has rejected an interest in developing minority role models as sufficiently compelling to justify race-based action in government employment. *Wygant*, 476 U.S., at 276 (plurality opinion) (rejecting role-model interest); accord *Croson*, 488 U.S., at 498 (plurality opinion) (confirming *Wygant*'s rejection). The Court's reasons—lack of limiting factors and the Constitution's lack of concern with amorphous attempts to remedy social disparities—are still sound today. In any event there was no evidence or argument from respondents on this point.

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[14] At the very least, there was sufficient record evidence to preclude the district court from granting summary judgment against petitioners on the ground that respondents had a justifiable belief that promoting based on the test results would violate Title VII.

3. Diversity Is Not at Issue, Nor Is It a Compelling Interest in First-Responder Command Positions.

Whether diversity is a compelling interest that could justify the city's decision is not properly before the Court. The city admitted that its goal was not to achieve racial diversity in the fire department. Pet.App. 940a, 943a-945a, 1013a-1037a. Since the case was decided against petitioners on summary judgment, respondents' own assertion that they did not act based on an interest in diversity precluded the district court from ruling against petitioners on that basis. See *Hunt*, 526 U.S., at 552 ("[I]t was error . . . to resolve the disputed fact of motivation at the summary judgment stage."); see also *Parents Involved*, 127 S.Ct., at 2790 (Kennedy, J., concurring in part and concurring in the judgment) ("When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.").

In any event, the Court has never held diversity to be a compelling interest beyond the very narrow context of higher education. See *Grutter*, 539 U.S., at 324-325. *Grutter* recognized a compelling interest in diversity, defined as "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element," as part of a "highly individualized, holistic review" of applicants. *Id.*, at 325, 337. But the Court "relied upon considerations unique to institutions of higher education," including the importance of diversity of speech and thought. *Parents Involved*, 127 S.Ct., at

2754 (plurality opinion) (citing *Grutter*, 539 U.S., at 329).

The same considerations about diversity of speech and thought in universities do not apply in public employment, especially in public-safety employment (and particularly in firefighting). Similarly irrelevant are considerations about the desirability of diversity in secondary and elementary schooling. See *id.*, at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Any compelling value of diversity to promote the exchange of ideas in education has less relevance once an individual has finished being educated and is out competing in the workplace. See, *e.g.*, *Lutheran Church-Mo. Synod* v. *FCC*, 141 F.3d 344, 354 (CADC 1998) ("We do not think diversity can be elevated to the 'compelling' level. . . . "). Diversity of thought is of limited importance in firefighter promotion when weighed against merit and competence in commanding first responders to fires, natural disasters, and other catastrophes. And the interest in giving children of different races equal educational opportunities to later compete in the 'real world' of employment is very different from racially adjusting adult competition for jobs in that real world.

Further, the diversity interest the Court has recognized as compelling in higher education is an interest in nuanced and individualized overall diversity of thought and opinion, not the bare racial balancing respondents seek. The Court has already rejected as uncompelling an interest in blunt racial

diversity, condemning it as disfavored racial balancing. See, *e.g.*, *Parents Involved*, 127 S.Ct., at 2758 (plurality opinion); *Grutter*, 539 U.S., at 330. Yet, respondents rejected petitioners' promotions simply because too many of the successful candidates were white (and various concerns said to flow from that perception), and out of a desire to change the balance of those numbers. Race was "not simply one factor weighed with others in reaching a decision, as in *Grutter;* it is *the* factor." *Parents Involved*, 127 S.Ct., at 2753; see *Gratz* v. *Bollinger*, 539 U.S. 244, 271-272 (2003) ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.").

At the very least, the Court should not take the pathbreaking step of extending the diversity rationale to employment without a detailed and persuasive showing of how diversity in first-responder promotions truly is a compelling government interest. This is a showing the respondents have not made, never attempted to make, and cannot make now given the lack of any evidentiary record.

4. Fear of Race-Related Political Criticism and Consequences Is Not a Compelling Interest.

Fear of "public criticism," and political unwillingness to defend Title VII suits, are not compelling interests justifying race-based action under the

Equal Protection Clause. Instead, they are exactly the sort of pressures against which the Clause is meant to be a bulwark. When race neutrality is politically popular, the Equal Protection Clause is not needed to sustain it. When it is politically unpopular, the Constitution's protections become more, not less, relevant.

D. Respondents' Action Was in Any Event Not Narrowly Tailored.

Even if the city had advanced a compelling interest to justify its actions, its remedy of cancelling promotions across the board after the test had been given and the results recorded does not even approach the constitutional requirement of narrow tailoring. There was simply no detailed evidentiary presentation to show that respondents relied "on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest." *Parents Involved*, 127 S.Ct., at 2790 (Kennedy, J., concurring in part and concurring in the judgment).

Even if there were a cognizable compelling interest in avoiding Title VII disparate-impact lawsuits, the city's race-based cancellation of promotions after a fully administered qualification process was not a narrowly tailored way to achieve it. The examinations were carefully designed to mitigate

anticipated adverse impact, even employing race-conscious measures. See *supra* pp. 7-9. No one ever proffered an equally valid alternative that would have just as accurately measured candidates' KSAs with demonstrably less disparate impact. The city was well aware earlier promotion tests had shown similar numerical disparities, Pet.App. 775a-779a, 950a-957a, 1019a-1020a, and, had the city desired, there were steps it might have taken prior to administering the tests to attempt to further reduce any anticipated disparity without overtly discriminating against petitioners because of their race. For example, the city could have provided tutoring programs and encouraged minorities with leadership potential to participate. Cf., *e.g.*, News Release, University of Texas System, Innovative Pre-Law Program Gets Dramatic Results, July 10, 2000, http://www.horizons.utep.edu/Releases/2000/July00/prelaw.html (describing program designed to assist minority students in preparing for law school). And, although potential candidates all receive roughly the same salary, the city might have made study aids available to all to encourage more candidates to prepare for the test. Pet.App. 91a, 193a, 346a-374a. None of these narrower approaches were tried.

What respondents did instead was far different. They developed and administered fair and race-neutral tests, recorded the results, coded them by race, and then discarded them after the fact, solely because of the racial distribution of the successful candidates. Far from being narrowly tailored, the

city's action was a blunt blow aimed at hammering out a crude racial balance. It needlessly stigmatized, injured, and frustrated individuals like Frank Ricci, who put time and money into studying diligently for the test despite being dyslexic, only to be told that he would not be promoted for no other reason than that he and too many other successful candidates were white. See Pet.App. 376a-378a.

E. Allowing Respondents' Action to Evade or Survive Strict Scrutiny Will Undermine Public Safety.

Petitioners endured a grueling dual-phase examination process carefully constructed to measure the KSAs deemed essential to the duties and responsibilities of commanders of first responders. Pet.App. 308a-328a, 340a-343a, 597a-650a. Forcing merit and ability to take a backseat to racial considerations would disserve public safety and efficiency by depriving the public of its most qualified servants, as determined by valid, merit-based tests. See *People Who Care*, 111 F.3d, at 535 (warning of "the almost certain consequence that the teachers it was hiring would on average not be as good as if it were on the basis purely of merit"). Fires and disasters, unlike governments, do not discriminate based on race. It will also create division within crucial institutions such as fire and police departments. It is unquestionably divisive for a government employer to administer a merits-based promotion process, encourage

candidates to sacrifice family time and resources studying for months, and then tell the successful candidates that the promotions they worked so hard for will be denied to them because too many of them are white.

II. THE CITY'S REFUSAL TO PROMOTE PETITIONERS VIOLATED TITLE VII.

The city violated Title VII in refusing to promote petitioners based on overt consideration of their race without any lawful command to do so. See 42 U.S.C. §2000e-2(a)(1). Respondents' claimed interest in avoiding disparate-impact claims and liability is not a legitimate excuse for intentional discrimination. The city cannot be immunized for its adverse employment actions against petitioners simply because city officials assert a "good faith belief" that promoting petitioners might have subjected the city to disparate-impact claims from minorities that, "for political reasons," they wished not to defend. Pet.App. 21a, 47a.

Disparate impact is not unconstitutional, and numerical disparities do not by themselves violate Title VII. Rather, 42 U.S.C. §2000e-2(k) makes clear that disparate-impact liability may be imposed "only if" the challenged employment practice cannot be shown by the employer to be "job related . . . and consistent with business necessity" or the complaining party demonstrates the existence and availability of an equally valid alternative that results in less

disparate impact and the government employer "refuses to adopt" that alternative.[15] Likewise, §2000e-2(j) specifically prohibits employers from granting preferences to prevent racial imbalances. Nevertheless, the district court concluded the city need not demonstrate that any putative complainant could meet these statutorily imposed burdens and instead held that numerical adverse impact itself sufficed to permit the city to undertake "voluntary race-conscious remedies." Pet.App. 37a-38a.

The Court should reject the framework created by the district court because it misapprehends the limited ramifications that stem from numerical disparity alone and will ineluctably lead to improper race balancing. There is no justification for judicially licensing overt race discrimination that so clearly violates Title VII in response to unintended numerical disparity that, without more, does not violate Title VII. The lower courts' wide safe harbor for discriminatory government actions flouts fundamental principles of constitutional strict scrutiny, improperly makes

[15] As the Court has noted, consistent with Title VII's aim "to achieve equality of employment opportunities," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), an employer's refusal to adopt an equally valid alternative with less adverse impact provides some evidence "that the employer was using its tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas*, 411 U.S., at 804-805). Respondents' test development efforts, focused as they were on maximizing minority opportunity, dispel any notion that they intended to use them to exclude minorities.

numerical disparities a justification for intentional discrimination against nonminorities, and irrationally encourages racial politics. The Court has never construed Title VII to permit such stark race-based treatment of individuals in the private sector, much less allowed governments to engage in it.

A. Petitioners Articulated a Valid Title VII Claim and the City's Proffered Responses Were Illegitimate and Unsupported.

Title VII makes it an "unlawful employment practice" for an employer:

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . ." 42 U.S.C. §2000e-2(a)(1)-(2).

Petitioners alleged a violation of this proscription by disparate treatment—that respondents "simply treat[ed them] less favorably than others because of their race." *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335, n.15 (1977). They did not have to

show any "formal, facially discriminatory policy," but could show respondents discriminated "on an ad hoc, informal basis." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). The "central element" of disparate treatment claims "is discriminatory intent." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2167 (2007).[16] Employer liability "depends on whether the protected trait . . . actually motivated [its] decision," in the sense that it "actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S., at 610. In this case, petitioners' race clearly played a causal role in the decision.

The city's only proffered defense to the petitioners' claims of disparate treatment was that its actions were justified because it was trying to avoid disparate-impact claims or to voluntarily comply with Title VII. Pet.App. 938a-945a, 1013a-1037a. But Congress "provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact does *not* justify preferential treatment for any group." *Biondo*, 382 F.3d, at 684. The record is full of evidence indicating that the race of petitioners drove the decision—the circulation of race-coded, name-redacted eligibility lists and blunt references to the skin color of the top candidates being only the most obvious examples. See *City of L.A., Dept. of Water & Power* v. *Manhart*,

[16] The other element, adverse employment action, is uncontested (and uncontestable) here. Pet.App. 23a; see, *e.g.*, *Kolstad* v. *American Dental Assn.*, 527 U.S. 526, 546 (1999).

435 U.S. 702, 712-713 (1978) ("The record contains no evidence that any factor other than the employee's sex was taken into account. . . . [O]ne cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex." (quotation omitted)). Nor is political pandering to organized racial lobbies separable from petitioners' race. *E.g.*, *Adarand*, 515 U.S., at 226; see also *United States* v. *City of Birmingham*, 727 F.2d 560, 564-565 (CA6 1984) (knowingly appeasing constituents with discriminatory views may be racially discriminatory purpose). At a minimum, motive was a hotly contested factual dispute irresolvable against petitioners on summary judgment. *Hunt*, 526 U.S., at 552.

B. The District Court's Authorization of Race-Based Reactions to Numerical Disparities Adopts a Substantive Rule Independent of the Summary Judgment Framework.

The district court's determination that a governmental employer may, without fear of Title VII liability, take race-based employment action to counteract mere numerical disparate impact, Pet.App. 37a-38a, adopts a substantive rule of (non)liability independent of the evidentiary framework employed at summary judgment. Consequently, the proper resolution of this case does not ultimately turn on the analytic framework used to evaluate the claims.

Although the district court employed the familiar *McDonnell Douglas* framework, it is most often used for circumstantial cases when there is no direct evidence of the use of race and the defendant asserts a legitimate, non-race-based reason for its action. That framework seems less suitable when a plaintiff proffers direct evidence of employer use of race in its employment decisions. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002). As petitioners noted in the court of appeals, CA2 Reply Brief 11, 20, n.17, there is no need to recast the city's justifications for its race-based actions as race-neutral, which they are not, and then look for pretext evidence. *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973).[17] Because respondents' reasons (even the purportedly legitimate ones) were all related to race, the case is more properly considered a direct-evidence case, in which respondents must demonstrate that their use of race was lawful.

But regardless of what framework applies, the evidentiary record clearly precluded granting summary judgment for respondents. There was no evidence to support their proffered defenses; at a bare minimum, there was evidence raising a genuine issue of material fact. Under a direct-evidence analysis, the record showed that respondents' motives were

[17] Under that framework, petitioners have clearly carried their initial burden of making out a *prima facie* case of disparate treatment. See Pet.App. 437a-438a, 801a-802a; *McDonnell Douglas*, 411 U.S., at 802 & n.13.

impermissible racial motives; under an indirect-evidence analysis, it showed that respondents' proffered reasons were pretexts for discrimination.[18] Whichever framework applies, the district court erred in fashioning a legal rule that declared respondents' bare assertion of a subjective good-faith desire to avoid disparate-impact claims sufficient to immunize the employer as a matter of law.[19] Pet.App. 24a, 43a. That rule conflicts not only with the strictures of the Constitution, but also with Title VII itself.

Instead, Title VII must be read, consistently with the Constitution, to never allow intentional discrimination in order to avoid unintentional discrimination. See *supra* Part I. But at a bare minimum, a governmental actor must have a "strong basis in evidence" that goes well beyond a *prima facie* case before it could ever engage in intentional racially disparate treatment based on a purported fear of disparate-impact claims.

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[18] The weakness of respondents' claimed motivations, see *infra* Parts II.C, D, and numerous other facts provide strong evidence of pretext. For example, IOS prepared individualized candidate assessments, detailing each candidate's respective strengths and weaknesses. Respondents refused to allow failing and low-scoring candidates to have this useful tool for improvement, undercutting their claims of interest in avoiding adverse impact. Pet.App. 233a-234a, 305a.

[19] See also, *e.g.*, *Parker* v. *Sony Pictures Entm't*, *Inc.*, 260 F.3d 100, 112 (CA2 2001) ("It is . . . no defense to liability in a discrimination action to hold a good-faith, but erroneous, belief that the law permits taking an adverse job action on the basis of a prohibited factor.").

Croson, 488 U.S., at 500 (quoting *Wygant*, 476 U.S., at 277).

C. Respondents Did Not Have the Strong Basis in Evidence Necessary to Justify Race-Based Actions to Avoid Disparate-Impact Liability.

Respondents did not have a strong basis to believe that race-based actions were needed to avoid disparate-impact liability. To the contrary, although they had statistical evidence of adverse impact, they also possessed (or willfully ignored) knowledge that any disparate-impact lawsuit was doomed to fail, acquired as part of their admitted effort to "get to" their desired end of finding an excuse to scuttle the promotions.[20]

The framework for establishing disparate-impact discrimination, as developed in this Court's cases and as codified in 42 U.S.C. §2000e-2(k), see also *Albemarle Paper*, 422 U.S., at 425, requires much more than the mere statistical disparity respondents relied on. The city relied on the four-fifths guideline, 29 C.F.R. §1607.4(D), to determine the presence of disparate impact, but the guideline is merely "a rule of thumb for the courts," *Watson*, 487 U.S., at 995, n.3 (plurality opinion), and does not by itself establish

[20] Pet.App. 459a (email from respondent Ude proposing Title VII strategy as "the ONLY way we get to a decision not to certify" (capitals in original)).

liability under §2000e-2(k).[21] A plaintiffs' statistical evidence of a "significantly discriminatory impact," *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982), must be coupled with either an invalid selection procedure or the refusal to adopt an available and equally valid alternative with less disparate impact. 42 U.S.C. §2000e-2(k)(1)(A) (noting that liability is established "only if" a *prima facie* case is accompanied by either type of proof); see *Albemarle Paper*, 422 U.S., at 425.

The city knew its exams were content-valid, dispelling any inference of discrimination that arose from the existence of a *prima facie* case. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 510-511 (1993); *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 255 & n.10 (1981) ("A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence."). IOS had validated the exams for content and job-relatedness during their development in accordance with EEOC guidelines, conducted a post-exam analysis of scoring results, and stood ready to deliver the customary technical report elaborating on its oral opinions of validity, until city officials cut it off. Pet.App. 329a-339a. Thus the city could have—and knew or willfully endeavored to avoid knowing it could have—discharged its burden

[21] By contrast the district court concluded that even less than a *prima facie* case can authorize intentional reverse discrimination. See Pet.App. 38a (citing *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 228 (CA2 1984)).

under *Albemarle Paper* "of proving that its tests [were] job related." 422 U.S., at 425. This was all it needed to do to raise a viable defense to any prospective disparate-impact claims based on the exams, a defense that would be effectively complete given the absence of any evidence that it was presented with and refused to adopt some equally valid alternative with less adverse impact. See *ibid*.; 42 U.S.C. §2000e-2(k)(1)(A).

Having resigned themselves to the exams' content-validity, and although not obligated to do so under the statute, respondents investigated the existence of alternatives to justify denying petitioners the promotions they earned. But no one established the existence and availability of an equally valid alternative with demonstrably less disparate impact, and the city has never claimed it was presented with one.[22] Hornick emphatically did not identify any such alternative. He specifically stated that he was "not suggesting that I/O Solutions somehow created a test

[22] Respondents initially relied in the district court on petitioners' admissions that there existed "alternative selection procedures . . . that have less adverse impact." Defs.' Memo in Support of Motion for Summary Judgment (Dkt. No. 52) 17-18. But petitioners never admitted such alternatives were job-related, let alone content-valid to the same high degree as IOS's exams or reasonably available to the city. See Pls.' Rev. Memo. of Law in Opp. to Defs.' Motion for Summary Judgment (Dkt. No. 81) 48-52; CA2 Appellees' Br. ADD-18, 30. Respondents subsequently abandoned this tack for the argument that they had a "good faith" belief there might be a suitable alternative. BIO 9; Pet.App. 1017a.

that has adverse impacts that it should not have had," Pet.App. 556a, and instead suggested that because adverse impact is common in written and oral knowledge examinations, the city might in the future dispense with them altogether and try an approach he called the "assessment center process." Pet.App. 557a-558a.[23] In the meantime, Hornick recommended that the board proceed with the promotions. Pet.App. 558a. As the district court acknowledged, Hornick never specifically explained what an assessment center approach would have entailed or that it would have demonstrably less adverse impact. Pet.App. 32a.[24]

Instead, the city asserts that it need only assert a "good faith belief" that less discriminatory alternatives exist. BIO 9; Pet.App. 1017a. In response to the

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[23] The district court's suggestion that the oral examination might have been given more weight, Pet.App. 33a, was contradicted by Hornick's statement that there was more disparate impact in the oral component, Pet.App. 550a, although Lewis concluded that the heavy concentration of minority assessors made the oral component "pretty much beyond reproach," Pet.App. 566a.

[24] The city's information on alternatives fell far short of the detailed EEOC guidelines on alternative selection procedures, which require any proposed alternative be proven content-valid before a decisionmaker may adopt it. See 29 C.F.R. §1607.3(B). Certainly none of Hornick's statements provided the city with any acceptable evidence on the potential validity of other exams or methods. See *id*. §1607.9(A) ("[s]pecifically rul[ing] out . . . testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes").

district court's inquiry, the city insisted that identifying alternatives was "for a different day," as respondents wished to conduct "studies" and continue to "explore" it. Pet.App. 1022a-1024a, 1027a, 1030a-1033a. The lower courts reasoned that having no good alternative to the exams was enough to justify abandoning the promotions. Supp.Pet.App. 2a (city had "no good alternatives"); see also Pet.App. 34a (noting "the shortcomings in the evidence on existing, effective alternatives" with less disparate impact). But "no good alternative," by its own terms, is not an *equally valid* alternative.

The city knew it had a rock-solid and complete exam-validity defense to any disparate-impact claim and that because it had not refused any legally sufficient alternatives, potential claimants could not defeat that defense. The city's rationale raised in response to petitioners' case, that it was attempting to avoid Title VII liability, was not only unsupported but indeed contradicted by the summary judgment evidence. The record made clear that the city's reasons were racial and that to the extent it was articulating any nonracial reasons, they were pretextual. Yet the lower courts declared an admittedly feeble putative claim of unintentional disparate impact (plus the city's bare assertions of "good faith") a summary-judgment winner over a clear case of intentional race-based discrimination.

Far more stringent curbs on government employers' justifications for self-initiated race-based deprivations are necessary to provide "adequate safeguards

against the danger" of Title VII disparate-impact liability evolving into a rationale for imposition of de facto quota systems. *Watson*, 487 U.S., at 993 (plurality opinion). Otherwise, employers claiming "good faith" will always be able to simply leapfrog from racial disparity directly to remedies that discriminate against nonminorities and establish de facto racial quota systems. Indeed, any rational employer will feel compelled to do so, if they can be sued for disparate impact based on mere numbers but can never be sued for cancelling promotions. The EEOC's four-fifths "rule of thumb" will become a Procrustean bed into which all selection results will be made to fit.

It is also necessary to preserve Title VII's protections of bona fide merit systems like those required by Connecticut law, and job-related ability tests implementing them, 42 U.S.C. §2000e-2(h); see also *Teal*, 457 U.S., at 452. Similarly, 42 U.S.C. §2000e-7's narrow limitation of the preemptive effect of Title VII "reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity," a goal shared by the merit-selection features required by Connecticut state law and the New Haven city charter. *Cal. Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U.S. 272, 283 (1987); see *id*., at 290, n.29 (Title VII overrides "only those state laws that expressly *sanction* a practice unlawful under Title VII," not "state laws that are silent on the practice"). In recognizing a disparate-impact theory, the Court noted that "the very purpose of Title VII is to promote hiring on the basis of job

qualifications, rather than on the basis of race or color." *Griggs*, 401 U.S., at 434. And Congress reaffirmed this commitment in 1991 with its enactment of §2000e-2(*l*). See *infra* Part II.E. That purpose is thwarted in a basic and intuitively unfair way if content-valid promotion exams designed to select candidates based on their job qualifications can be discarded based on mere numbers, speculation about alternatives, and an *ipse dixit* of good faith. See *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 575 (1984) ("[I]t is inappropriate to deny an innocent employee the benefits of his [merit] in order to provide a remedy in a pattern-or-practice suit such as this.").

Moreover, as the Court has recognized, the argument for allowing fears of tort liability to serve as a defense to Title VII liability for intentional discrimination rests on "unpersuasive propositions" in any event. *Automobile Workers* v. *Johnson Controls*, *Inc.*, 499 U.S. 187, 210 (1991). And for public employers in particular, discriminatory "voluntary compliance" must be based on strong evidence that it is really required to prevent an actual violation of Title VII. Cf. *Shaw*, 517 U.S., at 908, n.4.

It is clear from the circumstances of this case that the city's disparity-plus-good-faith formulation is effectively nothing more than a disparity test, because it would require neither a showing of content-invalidity nor an actual, concrete equally valid and available alternative with less disparate impact. In practice, that standard would permit outright racial

balancing, because it affords no weight to individuals' strong constitutional interest against being classified and differentially treated by the government because of their race. It is no great imposition to require government employers to ensure that a potential disparate-impact claim under §2000e-2(k) has a strong evidentiary basis before they may even consider engaging in intentional race-based disparate treatment, certainly not when both the Constitution and Title VII's core purposes are to prevent such treatment in all but the rarest of circumstances. See *supra* Part I; see also 42 U.S.C. §2000e-2(e)(1) (allowing race-based employment practices only when required by bona fide occupational qualifications).

At a bare minimum, employers cannot be permitted to infer discrimination from a purported *prima facie* case, when all the available evidence dispels that inference by indicating that their tests were job-related and that no equally valid, available alternatives existed that would have less adverse impact. See *Burdine*, 450 U.S., at 255 & n.10. They cannot be allowed to rebuff uncontroverted evidence that their tests were valid in order to claim that the putative *prima facie* case retained sufficient probative force to justify a race-conscious remedy that injures the successful applicants. Cf. *McQuiddy* v. *Ware*, 20 Wall. 14, 19 (1873) ("It will not do to remain willfully ignorant of a thing readily ascertainable.").

D. Respondents Did Not Have the Strong Basis in Evidence Necessary to Justify Race-Based Actions Purportedly Taken to Voluntarily Comply with Title VII.

Respondents' claimed wish to voluntarily comply with Title VII is similarly insufficient to justify race-based responses to numeric disparities and is unsupported in the summary judgment record. The disparate-impact case was weak. See *supra* Part II.C. There was no past discrimination to remedy, nor any claim in the district court of a "conspicuous imbalance in traditionally segregated job categories." *Johnson* v. *Transp. Agency*, *Santa Clara County*, 480 U.S. 616, 630 (1987) (quoting *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 209 (1979)).[25] The city thus had no basis at all to believe that its race-motivated actions "further[ed] Title VII's purpose of eliminating the effects of discrimination in the workplace," *ibid.*, rather than simply fostering discrimination where none had previously existed.

The rulings below authorize such discrimination whenever a test displays racially disproportionate results, without any basis for inferring that the test itself was in fact discriminatory—indeed, even in the face of evidence dispelling the possibility of inferring discrimination. Race-motivated actions in such a context are, at best, "inappropriate prophylactic

[25] Indeed, African-Americans have occupied the highest levels of command in the NHFD. J.A. 215-219.

measures" adopted in a misbegotten effort to eliminate "the myriad of innocent causes that may lead to statistical imbalances in the composition of [employers'] work forces." *Watson*, 487 U.S., at 992 (plurality opinion). At worst, they are simply smokescreens for impermissible race quotas. Either way, they violate Title VII.

The terms of Title VII's prohibition of adverse employment actions against "any individual" because of "such individual's race" "are not limited to discrimination against members of any particular race." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-279 (1976). Title VII thus "prohibits racial discrimination against the white petitioners in this case *upon the same standards* as would be applicable were they [African-Americans]." *Id.*, at 280 (emphasis added).

"Voluntary compliance" cannot extend to refusing to hire or promote successful candidates in a legitimate and fair qualifying process based merely on numerical disparity—certainly not in public employment. Under the city's view of the permissible scope of voluntary compliance, however, intentional discrimination against nonminorities is an acceptable means of achieving racial proportionality in the workforce, without any requirement that an employer determine whether it is "voluntarily complying" with any actual statutory command. Title VII does not "impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978); cf. *Shaw*,

517 U.S., at 908, n.4 ("[A] State may have a compelling interest in complying with the properly interpreted Voting Rights Act. But a State must also have a 'strong basis in evidence' for believing that it is violating the Act." (quotation omitted)). And the desire to increase opportunities for minority employment cannot justify acts of intentional disparate treatment. *Furnco Constr.*, 438 U.S., at 579 ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."). "[T]he 'bottom line'" of a racially balanced result "does not . . . provide [an] employer with a defense" to liability for discriminatory actions against individuals, regardless of their race. *Teal*, 457 U.S., at 442.

Respondents' claims of good faith[26] add nothing to their unsupported claims of voluntary compliance. Mere good faith provides no defense to an intentional discrimination claim. In cases in which "the employer may simply be unaware of the relevant federal prohibition" or "discriminates with the distinct belief that its discrimination is lawful," good faith may serve to bar punitive damages, but it does not operate as a defense to liability. *Kolstad*, 527 U.S., at 536-537.

Nor is there support for the city's broad voluntary-compliance rationale in *Johnson* or *Weber*. The city expressly disclaimed acting to remedy past

[26] While denying that any "good faith" defense exists, petitioners introduced a wealth of evidence that respondents acted in bad faith. See *supra* pp. 10-14.

discrimination, Pet.App. 945a, and never claimed in the district court that it was acting "to eliminate a manifest racial imbalance" in "traditionally segregated job categories." *Weber*, 443 U.S., at 208-209; see *Johnson*, 480 U.S., at 631-632 (requiring these features to justify voluntary measures assures consistency in achieving statute's purpose while not unduly harming other employees).

Nor did the city act pursuant to a preexisting affirmative action plan; it acted only in an *ad hoc* manner after tests were administered. Pet.App. 944a-945a; cf. *Johnson*, 480 U.S., at 641 (upholding gender-based choice between two equally qualified candidates under preexisting affirmative action plan that permitted consideration of prohibited factors as "but one of several factors that may be taken into account in evaluating qualified applicants"). The city's *ex post* decisionmaking is highly suspect, open as it was to impermissible pressures such as racial politics, cronyism, and racial balancing, as substantial evidence shows actually occurred. Its refusal to promote petitioners effectively imposed a racial quota, reserving an easily determinable number of promotion slots for African-Americans, transmuting the EEOC's four-fifths guideline into a mandate for racial proportionality. See J.A. 225-226.[27] And race was the sole factor

[27] Had the city employed the rule-of-three to maximize the number of minorities promoted, the 16 lieutenant vacancies open as of December 16, 2005, would have been filled by 13 whites and 3 blacks. See Pet.App. 429a-432a (race-coded rankings), 384a

(Continued on following page)

weighed in deciding not to promote petitioners. These facts betray the city's preference for "mere blind hiring by the numbers," a goal *Johnson* "emphatically did *not* authorize" and which indicates the validity of the city's action "fairly could be called into question." 480 U.S., at 636-637.

E. Respondents' Refusal to Honor the Exams' Outcome Contravened 42 U.S.C. §2000e-2(*l*).

Respondents' bold rejection of test results on the basis of petitioners' race is also independently prohibited by 42 U.S.C. §2000e-2(*l*). As part of the 1991 amendments to Title VII, Congress, in plain terms, declared:

> "It shall be an unlawful employment practice for a respondent, in connection with the selection [of] . . . candidates for . . . promotion,

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(number of vacancies), 235a-236a, 305a-306a (three African-Americans). This pattern would have meant a selection rate of 50% among white candidates who passed the lieutenant exam. See J.A. 225-226 (number of passing candidates by ethnic group). Thus, to achieve a 40% minority selection rate and meet the four-fifths guideline, the city would have had to promote 3 of the 6 passing black candidates, which it could have, and 2 of the 3 passing Hispanic candidates, which it could not at that time. See *ibid*.; Pet.App. 429a-432a. For captain, the city could have satisfied the four-fifths guideline for Hispanics but would have been 2 African-Americans short. See Pet.App. 434a-436a. That is, the city denied 5 highly qualified minorities well-deserved promotions—to their dismay, see Pet.App. 420a-422a—solely because it could not also promote 4 other minorities who had not qualified.

> to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race . . . " 42 U.S.C. §2000e-2(*l*).

Title VII unambiguously prohibits altering test results. "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quotation omitted). Aside from expressly forbidding the modification of scores and the use of different cutoff scores, the statute includes a broad proscription on "otherwise alter[ing]" test results on the basis of race.

The catch-all phrase encompasses the myriad means to manipulate test scores and results on the basis of race. The statute's expansive language conveys that any tactics designed to achieve the same prohibited objectives are forbidden. Just as using different score cut-offs and altering scores is impermissible, negating the entire results of valid examinations is barred. Ignoring and refusing to act on results to avoid a disfavored racial distribution causes even greater harm than piecemeal alterations. Rather than protect the integrity of test administration and merit-based advancement, the statute would instead be misused to confer a perennial mulligan right to the detriment of disfavored racial groups. This anomalous outcome would short-circuit §2000e-2(*l*) to allow racial discrimination in contravention of the express statutory language.

The legislative history of §2000e-2(*l*) confirms that abandonment of test results on the basis of race violates the statute. Congress enacted Title VII in 1964 to eliminate discrimination in employment. But despite the passage of Title VII, the adjustment of civil service examination results to achieve desired racial outcomes became increasingly prevalent. By 1991, thirty-four states utilized the procedure of "race norming," whereby test scores are altered so that the mean score is the same for each race. 137 Cong. Rec. H3930 (daily ed. June 5, 1991). Reasoning that "[a]ctual scores become meaningless and the job relatedness value of these tests is subsumed in favor of achieving a certain racial or ethnic mix," Congress found such practices to be "totally inconsistent with the principles and intent of title VII." *Ibid.* Congress responded by outlawing race-based manipulation of test results. See *Dean* v. *City of Shreveport*, 438 F.3d 448, 463 (CA5 2006) (emphasizing that statutory compliance with §2000e-2(*l*) "is required at all times").

Congress's intent was to enact a broad proscription: "The language of the section is broad and is designed to prohibit any action taken to adjust test scores, use different cutoff scores for selection or promotion, or otherwise adjust or alter in any way the results of employment-related tests on the basis of race, color, religion, sex, or national origin." 137 Cong. Rec. H9529 (daily ed. Nov. 7, 1991). And it intended no exception based on purported "disparate impact" in test scores: "race-norming may not be ordered by a

court as part of the remedy in any case, nor may it be approved by a court as a part of a consent decree, when done because of the disparate impact of those test scores." *Id*., at 9547. Congress's stated goal was to establish "a level playing field" and to ensure "selection based on merit" for "applicants and workers of all races, ethnic groups, and genders," *id*., at H9529, whereby "[e]veryone taking a test is doing so on an equal basis." 137 Cong. Rec. E2122 (daily ed. June 7, 1991). An employee is not taking a test on an equal basis or level playing field if her employer is able to throw the test out any time "too many" people of her race do well.

The district court rejected petitioners' §2000e-2(*l*) claim on the rationale that the subsection prohibits only race-norming of scores and that no race-norming was "alleged to have happened here." Pet.App. 39a. The court concluded that "the 1991 amendments do not affect the reasoning and holding" of either *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117 (CA2 1983), or *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (CA2 1984), that disparate pass rates between members of different race groups "justify voluntary race-conscious remedies." Pet.App. 39a. But §2000e-2(*l*) was passed in reaction to just such holdings, and Congress expressly rejected cases sanctioning the manipulation of test results to eliminate or mitigate a purported disparate impact. See, *e.g.*, 137 Cong. Rec. H9547 (daily ed. Nov. 7, 1991). Relying on case law superseded by §2000e-2(*l*) to allow circumvention of the provision negates the statutory text, ignores the

legislative history, and thwarts the purposes the statute was designed to achieve. The Court should reject that cramped interpretation.

F. The Judgment Conflicts with the Policies Underlying Title VII.

Respondents' vision of Title VII allows blatant intentional discrimination against nonminorities in order to avoid even a whisper of potential unintended disparate impact against minorities, and it gives government employers essentially unreviewable discretion to "voluntarily comply" with the statute by discriminating. It makes it trivially easy for government employers to play racial politics and to cover reverse discrimination by purportedly attempting to avoid alleged disparate impact even when they know to near-certainty they could never be held liable. That vision "runs counter to statutory policy" set out in Title VII and should be rejected. *Stotts*, 467 U.S., at 583, n.17.

"The statute's primary objective . . . [is] chiefly, not to provide redress but to avoid harm." *Kolstad*, 527 U.S., at 545 (quotations omitted). And the harms it seeks to avoid are harms to minority or nonminority individuals in equal measure. See *McDonald*, 427 U.S., at 280; *Griggs*, 401 U.S., at 431 ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."). Thus, Title VII must forbid employers to choose definite intentional disparate treatment of one racial

group to avoid a mere potential for unintentional disparate impact upon another racial group. The statute's purpose of avoiding harm cannot be served by allowing the imposition of *actual* harm in order to avoid *potential* harm.

The district court's construction forces innocent nonminorities, solely because of their race, to shoulder the burden of advancing employment opportunities for minority candidates by denying them the protections of a bona fide merit system even without any showing of intentional discrimination against minorities. While "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" the goals of Title VII, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), the Court has nonetheless recognized that such voluntary compliance cannot "be paid for" with the rights of innocent third parties, see *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983).

Permitting unilateral "voluntary compliance" to contravene individual employees' rights against nondiscrimination completely undermines the policy that voluntary compliance was meant to serve. *Ibid.* The laudable premise of encouraging employers to voluntarily meet their obligations not to discriminate should not in any event be twisted into a mechanism for fostering *sub rosa* discrimination against nonminorities. "[W]hatever factors the mechanisms of compromise may legitimately take into account[,] . . .

under Title VII race may not be among them." *McDonald*, 427 U.S., at 285.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be reversed.

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